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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 1259.

WILLIAM R. McKEE,
Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TABLE OF CONTENTS.

Opinions and Memoranda of the Courts Below 1

Counter Statement of Questions Involved 2

Summary of the Evidence 4

Grounds for Denying Certiorari 8

1. The general verdict of the jury for respondent resolved the conflicts in the evidence in favor of the respondent. Only when there is a complete absence of probative facts to support the conclusion reached by the jury shall a court interfere with or discard the verdict. Where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion 8

2. The liability of the employer under the safe place to work concept of the Federal Employers' Liability Act is not absolute but is founded upon negligence.

   Before an employer can be found negligent in failing to provide his employee with a safe place in which to work, it must be proven by a preponderance of the evidence that the employer had either actual or constructive notice of the defect or condition complained of as proximately causing the accident. This is particularly significant when the defendant is charged with "PASSIVE NEGLIGENCE."

   The Court of Appeals so held; the respondent agrees; the petitioner disagrees 9

3. Where the evidence does not show that the occurrence was unusual or extraordinary or that the accident was such as is ordinarily the result of negligence which may be attributed

only to the lack of care of the railroad, the doctrine of res ipsa loquitur shall not be invoked. The doctrine or res ipsa loquitur is not applicable when the plaintiff's own negligent conduct was a causative factor in bringing about his injury.

The doctrine or res ipsa loquitur is a doctrine of necessity. It shall be applied only when the event is so unusual and so extraordinary that it does not ordinarily occur in the absence of defendant's negligence, and the occurrence itself raises an inference of the defendant's negligence.

The Court of Appeals held that the absence of one board from a landing at the top of a small set of steps does not establish the necessity which warrants the application of the doctrine of res ipsa loquitur in a Federal Employers' Liability Act case. Such an occurrence is neither so unusual nor so extraordinary that it does not occur in the absence of negligence of the defendant.

The Court of Appeals so held; the respondent agrees; the petitioner disagrees ---------- 12

4. Does the substance of the charge given by the court defining actual and constructive notice in a Federal Employers' Liability Act case permit the jury to find for Mr. McKee upon the same inferences as would have been available to the jury had the petitioner's request to charge been given?

The charge of the District Court relating to actual and constructive notice as an element of negligence in a Federal Employers' Liability Act case affords the jury the same right to choose or reject an inference of constructive

notice to the employer that board was missing as would have been afforded to the jury if the court had used the language requested by petitioner's counsel ---------- 22

5. A jury determination that Mr. McKee failed to prove that Railroad had either actual or constructive notice of the fact that the board was missing is a determination of an ultimate fact by the trier of the facts in a Federal Employers' Liability Act case. Such determinations are properly submitted to the jury pursuant to Rule 49(b) of the Federal Rules of Civil Procedure ---------- 24

6. The Court of Appeals affirmed the District Court and approved the charge as given by the District Judge ---------- 25

Conclusion ---------- 26

Appendices:

A. Opinion of the United States Court of Appeals For the Sixth Circuit ---------- 28

B. Order of the United States Court of Appeals For the Sixth Circuit Denying Petition For Rehearing ---------- 33

C. Judgment of the United States Court of Appeals For the Sixth Circuit ---------- 35

D. Memorandum of District Court in Re: Settlement and Approval of Record on Appeal and Motion For a New Trial ---------- 36

E. Comparison of Charge and Requested Charge _ 46

TABLE OF AUTHORITIES.

Cases.

Atlantic Coast Line Railroad Co. v. Collins, 235 F. 2d 805 (4th Cir., 1956) (Cert. denied) ---------- 9

Atlantic Coast Line Railroad Company v. Dixon (5th Cir., 1951), 189 F. 2d 525 ---------- 10

Baltimore & Potomac Rd. v. Mackey, 157 U. S. 72, 39 L. ed. 624 ---------- 15

Basham v. Pennsylvania Railroad Co., 372 U. S. 699, 83 Supreme Court 965, 10 L. ed. 2d 80 (1963) ---8, 26

Dennis v. Denver and Rio Grande Western Railroad Co., 375 U. S. 208, 84 S. Ct. 291, 11 L. ed. 2d 256 (1963) ---------- 8

Fassbinder v. P. R. R. Co., 322 F. (2) 859 (3d Cir., 1963) ---------- 14

Forsman v. P. R. R. Co., 280 F. (2) 315 (3d Cir., 1960) ---------- 14

Gallick v. Baltimore & Ohio R. R. Co., 372 U. S. 108, 9 L. ed. (2) 618 (1963) ---------- 26

Herdman v. Pennsylvania Railroad Co., 352 U. S. 518, 1 L. ed. (2) 508 (1957) ---------- 19

Jesionowski v. Boston & Maine R. R., 329 U. S. 452, 91 L. ed. 416 (1947) ----------13, 18

Kaminski v. Chicago River and Indiana R. Co., 200 F. 2d 1 (7th Cir., 1952) ---------- 10

Lavender v. Kurn, 327 U. S. 465, 90 L. ed. 916 (1946) 26

Masterson v. New York Central R. R., 266 F. (2d) 1 (3d Cir., 1959) ---------- 18

Miller v. Cincinnati, New Orleans and Texas Pacific Railway Co., 317 F. 2d 693 (6th Cir., 1963) ---- ----------11, 14, 17, 18

Orr v. Southern Pacific Co., 226 F. (2d) 841 (9th Cir., 1955) ---------- 19

Purnell v. Missouri Pacific Ry. Co., 235 Ark. 957, 362 S. W. (2) 674 (1962), Cert. denied, 10 L. ed. (2) 199 (1963) ----------19, 20

Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443, 1 L. ed. 2d 493 (1957) ----------8, 26

Schilling v. Delaware & Hudson R. Corporation, 114 F. (2) 69 (2d Cir., 1940) ---------- 11

Sears v. Southern Pacific Co., 313 F. 2d 498 (9th Cir., 1963) ---------- 11

Shenker v. Baltimore & Ohio Railroad, 374 U. S. 1, 83 Supreme Court 1667, 10 L. ed. 2d 709 (1963) 15

Simmons v. Union Terminal Co., 290 F. (2d) 453 (5th Cir., 1961) ---------- 25

Sweeney v. Erving, 228 U. S. 233, 57 L. ed. 815 (1913) ----------13, 18

Vidal v. New York Central Railroad Co., 220 F. Supp. 922, affirmed 329 F. 2d 628 (2d Cir., 1964) ----- 11

Webb v. Illinois Central Railroad Co., 352 U. S. 512, 77 S. Ct. 451, 1 L. ed. (2) 503 (1957) ----------8, 16

Weigand v. P. R. R. Co., 267 F. (2) 281 (3d Cir., 1959) ----------14, 21

Wilkerson v. McCarthy (1948), 336 U. S. 53, 93 L. ed. 497 ---------- 9

Texts.

38 *Am. Jur.*, Negligence, Section 303 ---------- 19

Federal Rules of Civil Procedure.

Rule 49(b) ----------4, 24

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondent prays that this Court deny the Petition for Writ of Certiorari filed in this cause to review the judgment of the United States Court of Appeals for the Sixth Circuit which judgment affirmed the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, for the reason that the said judgment is in accord with the decisions of this Court.

OPINIONS AND MEMORANDA OF THE COURTS BELOW.

The Petitioner herein is appealing from the judgment of the United States Court of Appeals for the Sixth Circuit which per curiam affirmed the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, entered upon a general verdict and an answer to an interrogatory returned by the jury.

3. Where the evidence does not show that the occurrence was unusual or extraordinary or that the accident was such as is ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, the doctrine of res ipsa loquitur shall not be invoked. The doctrine of res ipsa loquitur is not applicable when the plaintiff's own negligent conduct was a causative factor in bringing about his injury.

The doctrine of res ipsa loquitur is a doctrine of necessity. It shall be applied only when the event is so unusual and so extraordinary that it does not ordinarily occur in the absence of defendant's negligence, and the occurrence itself raises an inference of the defendant's negligence.

The Court of Appeals held that the absence of one board from a landing at the top of a small set of steps does not establish that necessity which warrants the application of the doctrine of res ipsa loquitur in a Federal Employers' Liability Act case. Such an occurrence is neither so unusual nor so extraordinary that it does not occur in the absence of negligence of the defendant.

The Court of Appeals so held; the Respondent agrees; the Petitioner disagrees.

4. Does the substance of the charge given by the court defining actual and constructive notice in a Federal Employers' Liability Act case permit the jury to find for the plaintiff upon the same inferences as would have been available to the jury had the plaintiff's request to charge been given?

The charge of the District Court relating to actual and constructive notice as an element of negligence in a Federal Employers' Liability Act case affords the jury the same right to choose or reject an inference of constructive

notice to the defendant that the board was missing as would have been afforded to the jury if the court had used the language requested by plaintiff's counsel.

5. A jury determination that plaintiff failed to prove that defendant had either actual or constructive notice of the missing board is a determination of an ultimate fact by the trier of the facts in a Federal Employers' Liability Act case. Such determinations are properly submitted to the jury pursuant to Rule 49 (b) of the Federal Rules of Civil Procedure.

6. The Court of Appeals affirmed the District Court and approved the charge as given by the District Judge.

SUMMARY OF THE EVIDENCE.

At Ashtabula, Ohio, the New York Central Railroad Company operates railroad facilities in a northerly and southerly direction connecting the port facilities at the Ashtabula Harbor with the coal producing areas of Pennsylvania and steel centers of Youngstown and Pittsburgh. (11a.)

South of the railroad grade crossing of the east-west main line and the north-south main line the body of a box car was located on the east side of the right-of-way in the vicinity of an overhead signal bridge. This building had been converted for use as a yard office and was called "the signal bridge shanty." The shanty extended parallel to the tracks. At each end and at a slightly lower elevation, simple bridges crossed a drainage ditch permitting men to cross the drainage ditch and approach the shanty from the east. These bridges were maintained at approximately the same elevation as the lands on the east side of the drainage ditch. For many years these publicly

owned lands were used for access to this location and for parking automobiles.

The bridge at the north end of the shanty was illuminated by electric lights. The bridge at the south end had no artificial illumination. At the south end of the signal bridge shanty, and several feet west of the ties comprising the south bridge, wooden steps had been constructed consisting of stringers, and three or four steps or treads which led to a wooden platform or landing. The platform or landing at the top of the steps was approximately the same elevation as the floor of the signal bridge shanty. At the time of the accident, one of the several boards in the platform was not in place and was missing.

In the evening hours of August 15, 1961, William R. McKee drove his car to the signal bridge shanty looking for a fellow employee. (91a.) He intended to drive them in his car to another location where they were to commence work on this particular evening. Mr. McKee had been requested to pick up his fellow employee by a towerman. (92a.)

As Mr. McKee approached the vicinity of the signal bridge shanty from the east, he parked his automobile in the parking area immediately east of both the signal bridge shanty and the drainage ditch. Mr. McKee alighted from his automobile. He left his switch lamp on the seat of the automobile, and proceeded to walk toward the southerly end of the signal bridge shanty, over the bridge and onto the bank on the west side of the drainage ditch. He continued to walk toward and upon the steps at the south end of the signal bridge shanty. (93a.)

He walked up the steps in this darkened place without his switch lamp, and stepped into the opening occasioned by the missing board in the platform or landing at the top of the steps. (95a.)

Mr. McKee claimed that he had no knowledge of the missing board and had not used these steps and platform or landing for several weeks prior to his accident. (107a.)

Mr. McKee suffered substantial injuries to his knee, and after hospitalization and surgery had he opened his barber shop but was unable to return to his employment as a brakeman. (R. 229.)

Mr. Charles Nelson, a fellow brakeman and friend, testified that *several weeks prior* to the accident and prior to Mr. Nelson's vacation, he had observed the board was missing at the top of the steps at the south end of the signal bridge shanty, and that he had reported his observations to the yard master in charge of the area, a Mr. "Slim" Meyers. (17a.) Mr. Meyers had died prior to trial. (47a.)

Mr. Nelson admitted on cross examination that on the Thursday evening prior to commencement of the trial, he had been interviewed at his home by Mr. Robert J. Kelly, a District Claim Agent for the Railroad, that he knew who Mr. Kelly was and, that he had given Mr. Kelly a statement which had been reported stenographically.

The statement given to Mr. Kelly is directly contrary to Mr. Nelson's direct examination. Mr. Nelson admitted each of the contrary statements.

Mr. Nelson claimed during the trial that he lied when he stated to Mr. Kelly that there was no defect in the step or the board; that he never used the south approach and steps (25a); never found any defect (26a), and never knew of any defect prior to the occurrence in which Mr. McKee was injured. He admitted he lied to Mr. Kelly on the Thursday evening prior to the commencement of the trial during the interview at his home, but he insisted that during the trial and while under oath that he was telling the truth. (34a, R. 103.)

Mr. Nelson also admitted that he had been brought to Cleveland by plaintiff's counsel, had been maintained at the hotel during the trial by plaintiff's counsel, had spent several hours on the morning of his arrival in the company of plaintiff's counsel and their investigators. (31a.) He claimed that he had never seen the statement he had given to plaintiff's counsel shortly after the accident. (34a.) He claimed that he lied to Mr. Kelly and Mr. Dolan because he was nervous and upset because of an argument he had had with his wife prior to their arrival at his home. (30a.)

Mr. Charles Ashley testified that he was Mr. McKee's good friend and conductor (48a, 49a-50a); was the first person to reach Mr. McKee on the night of the accident; that the board was missing at the time of the accident; that the last time he, Ashley, had used the south steps platform and bridge, the board was not missing, and that the premises were in reasonably good condition.

Exhibits 4 and 5 are statements given by Mr. Ashley and admitted into the eivdence. (135a.)

The board which was missing measured about 12 inches by 18 inches to 2 feet, and it was the first of 3 or 4 boards in the platform or landing at the top of the steps. (67a.)

In Exhibit 5 Mr. Ashley states that this board was present the last time he had used the steps at the south end of the signal bridge shanty. (72a-73a, 60b.) Mr. Ashley gave this statement in December of 1961. During the course of the trial, Mr. Ashley claimed that he was mistaken as to having used the steps on the night before Mr. McKee's accident, but did admit to having worked the Saturday night and Sunday morning, August 12 and 13th, 1961, immediately preceding Mr. McKee's accident which occurred Tuesday evening, August 15, 1961. (54a, 72a.)

GROUNDS FOR DENYING CERTIORARI.

1. The general verdict of the jury for respondent resolved the conflicts in the evidence in favor of the respondent. Only when there is a complete absence of probative facts to support the conclusion reached by the jury shall a court interfere with or discard the verdict. Where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

The courts shall not improperly invade the function and province of the jury by substituting their judgment that a contrary inference or another conclusion is more logical or more apparent than the conclusion found by the jury, when there is an evidentiary basis for the jury's findings. *Basham v. Pennsylvania Railroad Co.*, 372 U. S. 699, 83 Supreme Court 965, 10 L. Ed. 2d 80 (1963).

The evidence permits the jury to determine those probative facts which support its verdict and its answer to an interrogatory. As the probative facts support with reason a verdict favorable to the respondent, the decision was exclusively for the jury to make. We must take it that the verdict was obedient to the trial judge's charge and that the jury found that Mr. McKee's accident did not arise from negligence of the respondent. Conversely, had the jury found that Mr. McKee's accident was proximately caused by negligence of the respondent, the decisions of this Court require that the verdict and judgment thereon be affirmed when the proofs support with reason its verdict. *Rogers v. Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957), *Webb v. Illinois Central Railroad Co.*, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. 2d 503 (1957), *Dennis v. Denver and Rio Grande Western Railroad Co.*, 375 U. S. 208, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963).

2. The liability of the employer under the safe place to work concept of the Federal Employers' Liability Act is not absolute but is founded upon negligence.

Before an employer can be found negligent in failing to provide his employee with a safe place in which to work, it must be proven by a preponderance of the evidence that the employer had either actual or constructive notice of the defect or condition complained of as proximately causing the accident. This is particularly significant when the defendant is charged with "PASSIVE NEGLIGENCE."

The Court of Appeals so held; the respondent agrees; the petitioner disagrees.

It has been clearly and firmly established that without proof of actual or constructive notice to the railroad of a defective condition, an employee allegedly injured as the result of such defect fails to establish his case under the Federal Employers' Liability Act, as the basis of liability under the Federal Employers' Liability Act is, and still remains, negligence. *Wilkerson v. McCarthy* (1948), 336 U. S. 53, 93 L. Ed. 497.

The foregoing rule is applicable in FELA cases. In *Atlantic Coast Line R.R. Co. v. Collins,* 235 F. 2d 805 (Fourth Cir., 1956) (Cert. denied), the Circuit Court of Appeals held that the evidence was insufficient to present a question for the jury as to the negligence of defendant railroad. In that case the injury was allegedly caused by a defective switch, the court noted that in the last analysis the plaintiff's case rested upon the contention that negligence on the part of the railroad must be inferred from the mere happening of the incident, which is exactly petitioner's contention in the instant case. The court stated that:

> "Actual or constructive notice that a sufficient piece of equipment has become defective or dangerous

through use must be shown to establish negligence on the part of the employer before an injured employee can recover damages."

Significant to the arguments presented in the instant case is the note found at the bottom of page 808 which reads:

"2. It should be noted that the present suit is based upon the provisions of 45 U. S. C. A. Sec. 51 making carriers by railroad liable for injuries to employees resulting from the negligence of the carrier and is not brought under the Safety Appliance Section, 45 U. S. C. A. Section 11, where an injured employee may recover by proving injury from a defective appliance without proof of negligence on the part of the carrier. Myers v. Reading Co., 331 U. S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615."

Actual or constructive notice was required in *Kaminski v. Chicago River and Indiana R. Co.*, 200 F. 2d 1 (Seventh Cir., 1952). The Court of Appeals held that the evidence established the railroad did not have either actual or constructive knowledge of the condition which caused the injury and, therefore, was entitled to a directed verdict.

The court noted that while the defendant had a duty to exercise reasonable care to furnish plaintiff with a reasonably safe place to work, "It was not an insurer of plaintiff's safety. The mere fact, therefore, that plaintiff sustained an injury does not render defendant liable. *Atlantic Coast Line Railroad Company v. Dixon* (Fifth Cir., 1951), 189 F. 2d 525."

The court noting:

"Before defendant can be charged with negligence in failing to remedy the condition which caused plaintiff's injury, or failed to warn plaintiff of the existence of such a condition, it is necessary to establish that the defendant had actual knowledge of the condition, or,

> in the exercise of ordinary care, should have known of its existence."

The court found that the only reasonable inference that could be drawn from such record was that the condition had been created within a short time before plaintiff's injury, hence defendant could not be charged with constructive knowledge of the condition. Cf. *Sears v. Southern Pacific Co.*, 313 F. 2d 498 (1963 CCA 9).

Accord: *Schilling v. Delaware & Hudson R. Corporation*, 114 F. (2) 69 (1940 CCA 2nd).

The Court held in *Miller v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 317 F. 2d 693 (Sixth Cir., May, 1963), in which the employee was injured by the defective condition of a nozzle which permitted a discharge of water, without the trigger having been pressed:

> "Defendant, however, properly argues that negligence cannot be predicated solely on the fact that the appliance was defective. *Under familiar law, defendant could not be convicted of negligence, absent proof that such defect was known, or should or could have been known, by defendant, with opportunity to correct it.* 56 C. J. S. Master and Servant Section 244, p. 1000. Carnegie Steel Co. v. Byers, 149 F. 667, 669 (C. A. 6, 1907); Atlantic Coast Line R. Co. v. Collins, 235 F. 2d 805, 809 (C. A. 4, 1956) cert. denied 352 U. S. 942, 77 S. Ct. 265, 1 L. Ed. 2d 238. *This rule is applicable to FELA actions where negligence is essential to recovery.* Kaminski v. Chicago River & Indiana R. Co., 200 F. 2d 1, 3, 4 (C. A. 7, 1952); Wilson v. Missouri Pacific R. Co., 319 Mo. 308, 5 S. W. 2d 19, cert. denied 278 U. S. 622, 49 S. Ct. 25, 73 L. Ed., 543." (Emphasis added.)

A recent case affirming the requirement of actual or constructive notice is *Vidal v. New York Central Railroad Co.*, 220 F. Supp. 922, affirmed by United States Court of Appeals, 2d Cir., on March 23, 1964, 329 F. 2d 628, where-

in the United States District Court for the Southern District of New York held in rendering a judgment for the defendant railroad in an FELA action, that even if the employee had proven the equipment in question was defective, that in order for the employer to have been negligent, not only must there have been evidence of defective equipment but also evidence of actual or constructive knowledge of this condition by the employer.

3. Where the evidence does not show that the occurrence was unusual or extraordinary or that the accident was such as is ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, the doctrine of res ipsa loquitur shall not be invoked. The doctrine of res ipsa loquitur is not applicable when the plaintiff's own negligent conduct was a causative factor in bringing about his injury.

The doctrine of res ipsa loquitur is a doctrine of necessity. It shall be applied only when the event is so unusual and so extraordinary that it does not ordinarily occur in the absence of defendant's negligence, and the occurrence itself raises an inference of the defendant's negligence.

The Court of Appeals held that the absence of one board from a landing at the top of a small set of steps does not establish the necessity which warrants the application of the doctrine of res ipsa loquitur in a Federal Employers' Liability Act case. Such an occurrence is neither so unusual nor so extraordinary that it does not occur in the absence of negligence of the defendant.

The Court of Appeals so held; the respondent agrees; the petitioner disagrees.

The petitioner complains that he was wrongfully denied an instruction relating to the doctrine of *res ipsa loquitur*. *Res ipsa loquitur* is a rule of necessity invoked

only when the cause of the accident cannot be readily determined. The accident in the case at bar consisted of the petitioner stepping into the opening which existed because a board was missing from the landing at the top of the steps at the south side of the Signal Bridge Shanty. The components of the accident are clear and unmistakeable. They consist essentially of two elements, first a missing board and, second, the petitioner's act of stepping into an existing hole. Without either component there would have been no accident.

Where, as here, there is direct and positive evidence of the cause of petitioner's injury, *res ipsa loquitur* is inapplicable.

In the leading case of *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815 (1913) cited in *Jesionowski v. Boston & Maine R. R.*, 329 U. S. 452, 91 L. ed. 416 (1947), the Supreme Court held:

> "In our opinion res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking * * *."

In the case at bar direct evidence of what caused the accident is not lacking. The direct evidence is that Mr. McKee stepped into an existing hole—the place formerly occupied by a board which was missing.

Mr. McKee failed to show that the accident occurred without his fault—he stepped into the hole—the hole had existed prior to his step. How long it existed was a disputed issue of fact, but its existence was obvious and admitted.

The causes of the accident being before the jury, *res ipsa* does not apply. In the following cases cited by peti-

tioner the case was unknown or could not be readily determined:

Miller—no known obvious defect—the water inexplicably surged out of the nozzle.

Miller v. C. N. O. & T. P. Ry. Co., 317 F. (2) 693 (1963 C. C. A. 6).

Weigand—the ground suddenly collapsed as the man stepped on to it.

Weigand v. P. R. R. Co., 267 F. (2) 281 (1959 C. C. A. 3).

Forsman—the ground suddenly collapsed under the employee.

Forsman v. P. R. R. Co., 280 F. (2) 315 (1960 C. C. A. 3).

Fassbinder—the hand brake dog inexplicably prevented the coach door from closing.

Fassbinder v. P. R. R. Co., 322 F. (2) 859 (1963 C. C. A. 3).

The petitioner contends that *res ipsa* must apply, he relies heavily upon the case of *Weigand v. Pennsylvania Rd. Co.*, 267 F. (2d) 281 (1959) in which the plaintiff while walking stepped upon soil in a railroad yard which collapsed under his weight. He fell into a circular hole about three feet in diameter and from five to six feet deep. Whereupon he brought suit for injuries. When the earth collapsed under his feet *res ipsa* was properly applied. Such is not the case at bar. In this instant case the board was missing and the step into the hole caused the accident. The cause is obvious, therefore, *res ipsa* shall not be invoked. Here, no necessity for the Rule is present.

In *Weigand*, the Court properly stated that *res ipsa* shall not be applied when the proofs established the exact

cause. The Court points out clearly in its opinion that *res ipsa* is not a rule of substance but is a procedural rule.

The evidence here shows and the jury was entitled to find (the testimony of the witness Ashley and Exhibits 4 and 5, the statements of Ashley) that the board was in place the night before the accident, the morning of the accident (72a), or within a day or two of the accident. (73a.) Conversely, they were also entitled to find that the board had been missing from three to six weeks prior to the accident per the testimony of the witness Nelson. (17a.)

The petitioner argues that the case of *Shenker v. Baltimore & Ohio Railroad,* 374 U. S. 1, 83 Supreme Court 1667, 10 L. Ed. 2d 709 (1963) holds that the mere existence of the defect is sufficient to predicate liability. We submit that at page 7 of 374 U. S., this Court approved the charge given by the trial judge. The charge so approved is analogous to the charge submitted to the jury in the case at bar. The approved charge is quoted as follows:

> " '* * * a railroad is under a duty to exercise ordinary prudence, caution and care to inspect and to furnish its employees with cars on which they work equipped with reasonably safe doors, even though the cars are owned by another railroad. A failure of the B&O Railroad to do so is negligence, providing that the railroad can foresee that one of the employees may be injured in performing his work in connection with that car and its equipment which are not reasonably safe.' "

We submit that the *Shenker* case holds that as to a railroad car the standard of care applicable to the use of cars was settled long before the *Shenker* case in *Baltimore & Potomac Rd. v. Mackey,* 157 U. S. 72, 39 L. ed. 624. The

opinion states that liability of the Baltimore & Ohio does not spring merely from the existence of the defect but rather from the failure of the Baltimore & Ohio "to use reasonable diligence to furnish safe appliances." This Court found that the Baltimore & Ohio admittedly had failed to inspect the car and *such failure was sufficient for a jury to find that in the exercise of ordinary care a reasonably prudent employer would have or should have taken some precautions to protect the plaintiff from possible defects in these cars.* Thus negligence in failing to reasonably inspect and repair is the foundation of the jury issue in the *Shenker* case. *The jury having resolved the issue in favor of the plaintiff, Shenker, the defendant, was not to be heard to complain about submission of the issue to the jury.*

The decision in *Webb v. Illinois Central Railroad Co.*, 352 U. S. 512, 77 S. Ct. 451, 1 L. Ed. (2) 503 (1957) held that the jury having resolved the issue relating to negligence in favor of the plaintiff, Webb, the defendant was not to be heard to complain about the submission of the issues to the jury when there were probative facts in evidence to justify with reason a finding of negligence. The jury verdict put to rest all speculation as to other causes over which the defendant had no control or responsibility. The judgment of the Court of Appeals which set aside the verdict was reversed and the case remanded for reinstatement of the judgment entered upon the verdict. Had the jury found that the clinker came from a source other than negligence of the railroad and that the railroad had used ordinary care to discover and remove it, a verdict in favor of the defendant would similarly have been supported because the proofs justified with reason the finding of the jury, notwithstanding that the jury may also with reason have attributed the accident

to other causes for which the employer was not responsible.

The petitioner complains that the case of *Miller v. Cincinnati, New Orleans & Texas Pacific Co.*, 317 F. (2d) 693 (1963) entitles him to a charge on *res ipsa loquitur* when the cause of the occurrence is known. We respectfully submit that the Court of Appeals relied upon this statement in the District Judge's opinion in the *Miller* case:

> "* * * There is complete absence of any evidence of when or how the defect arose or how long it had existed * * *. Unless proof by the plaintiff of the existence of the defect at the time of the injury is, standing alone and of itself, sufficient to create a jury issue as to the actual or constructive knowledge of the defect by the defendant, there is a complete absence of evidence in the record to support a verdict upon this issue."

In the case at bar *there was evidence of when the defect arose, how long it had existed, and though the witnesses differed as to the period of time between the first absence of the board and Mr. McKee's stepping into the hole,* it was an appreciable period of time. The evidence for the jury to accept or reject shows the period to be either one day or a part thereof or several weeks.

The classic test for the application of *res ipsa* is found in *Miller* where the cause of the water surging from the nozzle without the trigger being pressed was unknown. The expert testified that the unexpected discharge of water was caused by an improperly positioned trigger, a latent defect. The defendant, however, argued that while the jury could find that the appliance was defective, the jury could not find that the defendant had either actual or constructive notice. The Court held that the jury could find that the appliance was defective and further find

that there was negligence. To find negligence the jury was permitted to infer either actual or constructive notice.

In the case at bar we have no latent defect as in the *Miller* case, but rather a patent defect—the complete absence of a board—the cause of the accident being Mr. McKee's step into the existing hole. There is nothing here which demands an explanation to escape an inference of negligence. When a board is missing it is neither an extraordinary nor unusual happening. It is not analogous to a train wreck or the derailment of a train as was discussed in *Jesionowski v. Boston & Maine Rd.*, 329 U. S. 452, 91 L. ed. 416 (1947).

As stated by the Court in *Sweeney v. Erving*, 228 U. S. 233, 57 L. ed. 815 (1913) *res ipsa* warrants the inference that the defendant may be negligent when direct evidence is lacking. In the case at bar there was direct evidence of the missing board. There was direct evidence as to the period of time the board was missing. The differences related only to how long it was missing prior to Mr. McKee's accident. Thus there is no necessity for the inference to be raised by law but rather the inferences spring from the evidence. The jury is not bound to determine the issues in favor of the plaintiff. It is for the jury to determine whether the preponderance of the evidence upon the issue is with the plaintiff.

The doctrine of *res ipsa* shall be applied only where direct evidence of negligence is lacking and the facts of the occurrence standing by themselves warrant an inference of negligence. It shall not compel such an inference.

In the case of *Masterson v. New York Central R. R.* before the Court of Appeals for the 3rd Circuit, 266 F. (2d) 1 (1959), before the District Court, 169 Fed. Supp. 435, the Court held that in the face of direct evidence

res ipsa shall not apply. Here plaintiff claimed to have been struck by a flying piece of a brake shoe which broke off while the train was moving. The District Court states at page 438:

> "In the instant case it is obvious, of course, that direct evidence of what caused plaintiff's injury is not lacking."

This is in accord with the rule as stated in 38 *Am. Jur.* Negligence, Section 303:

> "The doctrine of res ipsa loquitur has no application where all the facts and circumstances appear in evidence. Nothing is then left to inference, and the necessity for the doctrine does not exist. Being a rule of necessity, it must be invoked only where evidence is absent and not readily available. It is not to be invoked when the evidence is available, and certainly not when it is actually presented."

In the case of *Orr v. Southern Pacific Co.*, 226 F. (2d) 841 (1955 C. C. A. 9) the Court held:

> "Res ipsa loquitur is a procedural rule as to evidence. *It is never valid in the face of facts which adequately explain the occurrence.*" (Emphasis ours.)

In *Purnell v. Missouri Pacific Ry. Co.*, 235 Ark. 957, 362 S. W. (2) 674 (1962) Cert. denied, 10 L. ed. (2) 199 (1963), the Supreme Court of Arkansas held that *res ipsa loquitur* shall not be applied in an FELA case upon the mere happening of an accident. The Court quoted from *Herdman v. Pennsylvania Railroad Co.*, 352 U. S. 518, 1 L. ed. (2) 508 (1957):

> "* * * The proofs do not meet the tests laid down by this Court in *Jesionowski v. Boston & Maine R. Co.*, 329 U. S. 452, 67 S. Ct. 401, 91 L. ed. 416. The employee's injuries in the *Jesionowski* case resulted from a derailment. This Court held that derailments are

'extraordinary, not usual, happenings,' so that when they occur 'a jury may fairly find that they occurred as a result of negligence.' "

The opinion continues stating:

"The extraordinary circumstances that make applicable the doctrine of res ipsa loquitur are absent in this case. The appellant pinpoints the cause of his injury; that is, that the journal box was defective, requiring extraordinary force and that when the lid of the journal box gave way he stepped back suddenly and stepped back on some object that he alleged the appellee had left at that location and that he was therefore not furnished with a safe place to work. The doctrine of res ipsa loquitur does not apply in this case."

Direct evidence of what caused the accident was before the jury in the *Purnell* case. Therefore, *res ipsa* was not invoked as the necessity for the doctrine did not exist. It is never to be invoked when evidence of the cause of the occurrence is present on the record.

The District Judge states in his Memorandum overruling the Motion for new trial in this case his well considered view:

"The Sixth Circuit, in the case of *O'Mara v. Pennsylvania R. R. Co.*, 95 F. 2d 762 (1938 C. C. A. 6), has declared when the doctrine of res ipsa loquitur in applicable, as follows:

'The doctrine is one of necessity, applicable where the agency or place of the accident is accessible only to the defendant and under his control, and raises an inference of negligence requiring the defendant to explain the accident, if he may, on ground other than his negligence, when its nature is such as to make it probable that it would ordinarily not have happened except for his negligence.' (P. 763.)

> In the instant case both parties have admitted that on August 15, 1961, the defendant had on its property what has variously been described as a wooden bridge, stairway, and platform south of the signal bridge shanty, and that the same constituted a railroad facility, under the exclusive possession and control of the defendant, which on the date involved herein was being held open for the use of the defendant's employees to gain access to the signal bridge shanty. It has been further admitted that on the night of August 15, 1961, at the time the plaintiff was traversing upon said facility, a board which formed a part of the walking surface thereof was missing, and that the plaintiff stepped into the opening occasioned by the absence of the board. Under these circumstances there is no necessity to use the doctrine of res ipsa loquitur. The *Miller* and *Shenker* cases, *supra*, relied on by plaintiff's counsel in the Court's chambers, are not applicable to the facts in this case, and the additional cases offered by plaintiff in the motion for a new trial merely supplement *Miller* and *Shenker*."

In the case at bar the cause of the accident consists simultaneously of a hole occasioned by the absence of the board and the step of Mr. McKee into the hole. The step into the hole can never be found to be within the exclusive control of the respondent and the contributing conduct of Mr. McKee can never be charged to the employer. Had the board been present and collapsed or broken under the weight of Mr. McKee as he stepped on it, we would be confronted with the classic *res ipsa* case, *Weigand v. Pennsylvania Railroad Co., supra.*

4. Does the substance of the charge given by the court defining actual and constructive notice in a Federal Employers' Liability Act case permit the jury to find for Mr. McKee upon the same inferences as would have been available to the jury had the petitioner's request to charge been given?

The charge of the District Court relating to actual and constructive notice as an element of negligence in a Federal Employers' Liability Act case affords the jury the same right to choose or reject an inference of constructive notice to the employer that board was missing as would have been afforded to the jury if the court had used the language requested by petitioner's counsel.

We have set forth the pertinent portion of the charge as given next to the charge which was requested.

Abstract of Charge Given

1. * * * A board was missing from the facility provided by the Railroad which rendered the facility unsafe. * * *

2. * * * The wooden bridge, stairway and platform south of the signal bridge shanty constituted a Railroad facility on Railroad property under the exclusive possession and control of the Railroad and held open for use of Employees * * *.

3. * * * Defendant has a continuing non-delegable duty to exercise reasonable care to maintain such facility in a reasonably safe condition for use by its employees, which include a duty to exercise ordinary care to inspect and to discover and correct any defect which would render such facility unreasonably hazardous, if such defect was known, or in the exercise of ordinary care could and should have

Plaintiff's Request to Charge

"You are further instructed that upon proof by Plaintiff of a defect of such facility under Defendant's exclusive possession, management and control, which renders such facility unreasonably hazardous as to his safety as an employee, the Plaintiff upon such proof, makes a prima facie case of negligence against the Defendant which entitles you, the jury, to infer that Defendant was negligent in failing to use reasonable care to provide a reasonably safe facility, and particularly that Defendant could and should have discovered the defective condition thereof, and provided an adequate warning of its existence or corrected the defect." (R. 176a.)

Abstract of Charge Given

been known by the Defendant with reasonable opportunity to correct the defect. * * *

4. * * * Actual notice is such notice as is proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry. While constructive notice is information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it. * * *

5. * * * If you * * * find that the Plaintiff has proved, by a preponderance of the evidence, that the Defendant had Constructive Notice of the missing board and had reasonable time to repair the defect before the Plaintiff was injured, you should return a verdict for the Plaintiff. * * *

6. * * * In determining whether ordinary care was used by the Railroad, you will consider whether the Railroad ought to have inspected and discovered the missing plank under the attending circumstances with reasonable opportunity to repair it. If an ordinary person under similar circumstances, or by the use of ordinary care, would have foreseen the result and would have taken precaution to avoid the result, then the performance of the act or the failure to take such precaution constitutes negligence. * * *

Petitioner's counsel, aware of the trial judge's view of the law as it applied to the issues at bar, was completely satisfied with the charge as given, and in particular, was satisfied that the jury was instructed that they could infer notice of the existing condition from the failure of the railroad to effectively perform its non-delegable, continuing duty to use reasonable care to inspect, to discover, and to correct any defect which would render such facility reasonably hazardous or, in the exercise of ordinary care, could or should have been known by the Railroad. The court specifically charged that if the jury found by due diligence the Railroad should have known, and the situation was such as to cast upon it the duty of inquiring and it failed to inquire, the Railroad was liable on account of its failure to effectively inquire.

The substance of the charge as requested by the petitioner was afforded to him in that the jury could determine either actual notice if they believed the testimony of Mr. Nelson, or constructive notice from the kind and character of the defect.

5. A jury determination that Mr. McKee failed to prove that Railroad had either actual or constructive notice of the fact that the board was missing is a determination of an ultimate fact by the trier of the facts in a Federal Employers' Liability Act case. Such determinations are properly submitted to the jury pursuant to Rule 49(b) of the Federal Rules of Civil Procedure.

The trial court submitted to the jury the following interrogatory among other interrogatories with the General Verdict:

> "Interrogatory No. 1: We, the jury, being first duly impaneled and sworn, do find as follows on the factual issues set forth below:

'Has the plaintiff proven by a preponderance of the evidence that the defendant had either actual or constructive notice that the board was missing prior to Mr. McKee's accident?' "

The jury answered this interrogatory with a "No."

The interrogatories submitted to the jury as well as the interrogatory complained of by petitioner's counsel conform to the tried and tested interrogatories suggested by the Judicial Conference of the United States. *Jury Instructions,* an outline published by the learned Judge W. F. Smith of New Jersey, a learned and experienced District Judge, recommends that the use of interrogatories is desirable when a verdict is dependent upon the initial determination of decisive issues.

Judge Smith recommends its use in Federal Employers' Liability Act cases. In *Simmons vs. Union Terminal Co.,* 290 F. (2d) 453 (1961, C. C. A. 5), the per curiam opinion of the Fifth Circuit commends the practice.

The interrogatories submitted by the learned Judge Kalbfleisch were in accord with the custom and practice of the United States District Courts.

6. The Court of Appeals affirmed the District Court and approved the charge as given by the District Judge.

There was no mistake of omission or inadvertence as to the position of the parties in their briefs in either the District Court or in the Court of Appeals. There was no mistake relating to the charge as given during the course of argument in the Court of Appeals. In the per curiam opinion the petitioner's request to charge was inadvertently added as part of the charge as given by the trial court. Upon application for rehearing, the Court of Appeals recognized the inadvertent mistake and deleted from its opinion the inadvertent error, Appendix B. The correct

charge was before the Court of Appeals in the record. The respondent's supplement to its brief contained portions of the charge relating to notice as given by the District Court, Appendix "E" hereof.

CONCLUSION.

The verdict of the jury and the judgment entered thereon are in accord with the evidence. Pursuant to the decisions of the Supreme Court of the United States it is for the jury to determine all the fact questions in an FELA case. Where the proofs justify with reason the conclusion that the employer is not negligent, such a jury verdict must be respected. *Basham v. Pennsylvania Rd. Co.*, 372 U. S. 699, 10 L. ed. (2) 80 (1963); *Gallick v. Baltimore & Ohio R. R. Co.*, 372 U. S. 108, 9 L. ed. (2) 618 (1963); *Rogers v. Missouri Pacific R. R.*, 352 U. S. 500, 1 L. ed. (2) 493 (1957).

The Supreme Court of the United States has stated in *Lavender v. Kurn*, 327 U. S. 465, 90 L. ed. 916 (1946):

> "Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

Thus this case having been properly submitted to a jury, the jury verdict is not to be challenged. The evidence, particularly the testimony of the witnesses Nelson, Wilcox, McKee and Ashley, when considered in the light of Ashley's statements, *Exhibits 4 and 5, admitted without either objection or limitation,* clearly permits the jury to find that neither actual nor constructive notice of the missing board was proven by a preponderance of the evidence on the issue.

The Court of Appeals properly affirmed the judgment entered upon the jury's verdict and answer to the interrogatory. Petitioner's counsel did not except or request any charge or any modification of the charge other than that set forth and specifically considered by the Court of Appeals.

We respectfully submit that it would be improvident to grant a Writ of Certiorari in the case at bar.

Respectfully submitted,

J. F. DOLAN,
T. R. SKULINA,
Attorneys for Respondent.

APPENDIX A.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided January 21, 1966.)

Before: WEICK, Chief Judge, EDWARDS and CELEBREZZE, Circuit Judges.

PER CURIAM. William R. McKee, hereinafter referred to as plaintiff, initiated this action by charging his employer, The New York Central Railroad Company, hereinafter referred to as defendant, with negligence under the Federal Employers' Liability Act, 45 U. S. C., Sections 51 through 60, and amendments thereto. The jury returned a verdict for defendant. Plaintiff appeals.

In the evening hours of August 15, 1961, plaintiff, without the use of his switch lamp, was walking to a signal bridge shanty located on defendant's property. Plaintiff was sent to the shanty by his supervisor with orders to get the rest of the crew. In order to reach the shanty, it was necessary that plaintiff cross a bridge of simple construction. The bridge was not artificially illuminated. At the time of the accident, one of the boards in the platform or landing at the top of the steps leading to the bridge was missing. While walking up the steps, the plaintiff sustained an injury to his right knee when he stepped into the opening occasioned by the missing board.

The main assignment of error urged by the plaintiff is the failure of the trial court to submit to the jury an instruction upon the doctrine of res ipsa loquitur. Plaintiff maintains that the refusal to charge on res ipsa loquitur denied him the inference to which he was entitled that defendant had knowledge or notice of the defect. A witness for the plaintiff testified that several weeks prior to the accident he had observed the board was missing and that

he had reported his observation to the yard master. The same witness gave a contrary statement to the defendant that there was no defect in the step or the board.

On the issue of notice the Court charged:

"3. * * * Defendant has a continuing non-delegable duty to exercise reasonable care to maintain such facility in a reasonably safe condition for use by its employees, which include a duty to exercise ordinary care to inspect and to discover and correct any defect which would render such facility unreasonably hazardous, if such defect was known, or in the exercise of ordinary care could and should have been known by the Defendant with reasonable opportunity to correct the defect. * * *

"4. * * * Actual notice is such notice as is proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry. While constructive notice is information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it. * * *

" 'You are further instructed that upon proof by Plaintiff of a defect of such facility under Defendant's exclusive possession, management and control, which renders such facility unreasonably hazardous as to his safety as an employee, the Plaintiff upon such proof, makes a prima facie case of negligence against the Defendant which entitles you, the jury, to infer that Defendant was negligent in failing to use reasonable care to provide a reasonably safe facility, and particularly that Defendant could and should have discovered the defective condition thereof, and provided an adequate warning of its existence or corrected the defect.'

"5. * * * If you * * * find that the Plaintiff has proved, by a preponderance of the evidence, that the Defendant had Constructive Notice of the missing board and had reasonable time to repair the defect before the Plaintiff was injured, you should return a verdict for the Plaintiff. * * *

"6. * * * In determining whether ordinary care was used by the Railroad, you will consider whether the Railroad ought to have inspected and discovered the missing plank under the attending circumstances with reasonable opportunity to repair it. If an ordinary person under similar circumstances, or by the use of ordinary care, would have foreseen the result and would have taken precaution to avoid the result, then the performance of the act or the failure to take such precaution constitutes negligence. * * *"

The jury was instructed that they could find notice of the existing condition from the failure of the Railroad to effectively perform its non-delegable, continuing duty to use ordinary care to inspect and disclose and correct any defect which would render such facility hazardous. In addition to this charge on notice, the plaintiff also introduced testimony that the defendant was notified that the bridge was defective. The same witness testified on cross examination that he told the defendant there was no defect in the step. Because of the answer to Interrogatory No. 1, the jury apparently did not believe this witness.

In denying the motion for a new trial, the trial Judge said:

"In essence, the plaintiff seeks a new trial based upon the claim that the Court erred in refusing to give the plaintiff the benefit of an instruction upon the doctrine of res ipsa loquitur. The Sixth Circuit, in the case of O'Mara v. Pennsylvania R. R. Co., 95 F. 2d 762, has declared when the doctrine or res ipsa loquitur is applicable, as follows:

"(9) 'The doctrine is one of necessity, applicable where the agency or place of the accident is accessible only to the defendant and under his control, and raises an inference of negligence requiring the defendant to explain the accident, if he may, on grounds other than his negligence, when its nature is such as to make it probable that it would ordinarily not have happened except for his negligence.'

"In the instant case both parties have admitted that on August 15, 1961, the defendant had on its property what has variously been described as a wooden bridge, stairway, and platform south of the signal bridge shanty, and that the same constituted a railroad facility, under the exclusive possession and control of the defendant, which on the date involved herein was being held open for the use of the defendant's employees to gain access to the signal bridge shanty. It has been further admitted that on the night of August 15, 1961, at the time the plaintiff was traversing upon said facility, a board which formed a part of the walking surface thereof was missing, and that the plaintiff stepped into the opening occasioned by the absence of the board. Under these circumstances there is no necessity to use the doctrine of res ipsa loquitur."

We agree with the District Court that under these circumstances there was no necessity to apply the doctrine of res ipsa loquitur. *Williamson v. Jones & Laughlin Steel Corp.*, 213 F. 2d 246 (C. A. 6, 1954), and *Miller v. Cincinnati, New Orleans and Texas Pacific Railway Co.*, 317 F. 2d 693 (C. A. 6, 1963), relied upon by the plaintiff, are not applicable for the reason that plaintiff's proofs here establish the defective condition of the bridge without the necessity of applying the doctrine of res ipsa loquitur. The *Miller* case holds that where the doctrine is applicable to permit an inference of a defective instrumentality,

the inference must include all the essential elements of negligence, including an inference that the defendant had constructive knowledge of the defective instrumentality.

We find no error in the Court's charge to the jury, or in the submission of Interrogatory No. 1.

The judgment of the District Court is affirmed.

APPENDIX B.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING.

Before: WEICK, *Chief Judge*, EDWARDS and CELEBREZZE, *Circuit Judges*.

Plaintiff-Appellant has filed a petition for rehearing on the ground that this Court erroneously quotes the charge of the Trial Court on the issue of notice.

The following charge which was requested by the plaintiff and reproduced in this Court's opinion, at pages 2 and 3, will be deleted:

> "You are further instructed that upon proof by plaintiff of a defect of such facility under Defendant's exclusive possession, management and control, which renders such facility unreasonably hazardous as to his safety as an employee, the plaintiff upon such proof, makes a prima facie case of negligence against the Defendant which entitles you, the jury, to infer that Defendant was negligent in failing to use reasonable care to provide a reasonably safe facility, and particularly that Defendant could and should have discovered the defective condition thereof, and provided an adequate warning of its existence or corrected the defect."

The above quoted requested charge was inadvertently added as part of the charge given by the Trial Court. In affirming the judgment of the District Court, this Court agreed that the doctrine of res ipsa loquitur was not applicable, and that the Trial Court was correct in not giving the above requested charge.

Plaintiff-Appellant also calls to the Court's attention *Oberlin v. Friedman*, 5 O. S. 2d 1 (1965).

Upon consideration, it is ORDERED that the above quoted requested charge of the Plaintiff-Appellant, ap-

pearing at pages 2 and 3 of this Court's opinion, be and it is hereby deleted from the opinion, and the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT
CARL W. REUSS,
Clerk.

APPENDIX C.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 21, 1966.)

BEFORE: WEICK, *Chief Judge*, EDWARDS and CELEBREZZE, *Circuit Judges.*

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendant-Appellee recover from Plaintiff-Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

APPENDIX D.

MEMORANDUM IN RE: SETTLEMENT AND APPROVAL OF RECORD ON APPEAL AND MOTION FOR A NEW TRIAL.

(Filed September 29, 1964.)

KALBFLEISCH, *J.*

In plaintiff's suit against defendant under the Federal Employers Liability Act the jury returned a verdict for defendant. Plaintiff now has filed a three-branch motion for a new trial.

The first branch of plaintiff's motion asserts that the verdict of the jury is contrary to the manifest weight of the evidence. In determining whether a jury verdict in a civil case is manifestly against the weight of the evidence, the evidence must be reviewed in the light of the rule of preponderance, and such verdict will not be vacated or set aside unless it is *manifestly* contrary to the weight of the evidence. The Court finds there is substantial evidence to support the verdict; therefore, the first branch of the motion for a new trial will be overruled.

The second and third branches of plaintiff's motion, if not repetitious, are so similar as to permit the Court to describe them as claims that the Court erred in its instructions to the jury by failing to give the plaintiff the benefit of an instruction upon the (2) doctrine of res ipsa loquitur. Before considering branches 2 and 3, the Court must initially determine whether the record shows that the plaintiff complied with Rule 51, Federal Rules of Civil Procedure.

The record discloses that the jury was sworn and the case commenced on April 6, 1964, and the court stenographer in attendance throughout the trial was N. M. Czompoly. The introduction of evidence was concluded

when both parties rested at 2:00 P.M. on April 9, 1964. Thereafter the record contains the following:

> "(Thereupon a discussion ensued at the bench between the Court and counsel out of the hearing of the jury.)"

The Court then addressed the jury in part as follows:

> "In order to complete this case, from this point on, the attorneys on each side will have an opportunity to argue their case; and then the Court must instruct you as to the law of the case.
>
> "Now, when we recessed at noon, it was indicated that counsel wanted to discuss with the Court the instructions which the Court would give, and it was not known by the attorneys at that time how long they would be before they would finish the evidence. It has transpired that we have finished with the evidence in this case at this point, and the lawyers still want to talk to me about what instructions I am going to give, before they argue the case to you.
>
> "Now, it is obvious that we can't sit and talk about this and iron out questions that we have to iron out in a few minutes."

According to the record there was a further short comment by the Court, after which the case was adjourned until 10:00 A.M. Friday, April 10th.

The record for April 10, 1964, begins with the opening of court and contains thereafter the closing arguments presented by Messrs. Nurenberg and Dolan, which arguments occupied the entire morning session. Next, the record shows that the trial was resumed at 1:30 P.M., when the Court instructed the jury. At the conclusion of the Court's charge, the Court inquired as follows:

> "Do counsel have any further suggestions?"

(3) It is important to note at this point that plaintiff's counsel made no response to this question, nor does the

record disclose that the plaintiff objected to the instructions as given; in fact, plaintiff's counsel in his brief admits "plaintiff did not request any additions or corrections in the charge."

Rule 51, of the Federal Rules of Civil Procedure, provides, in part:

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The object of Rule 51 is to afford a trial judge opportunity to correct error in his charge before the case is finally submitted to the jury. *Moore v. Stevens*, 271 F. 2d 119, 120 (6th Cir. 1959). In the cases of *Williams v. Powers*, 135 F. 2d 153, and *Louisville & Nashville R. R. Co. v. Farmer*, 220 F. 2d 90, the Sixth Circuit has declared that formal exceptions to instructions under Rule 51 are not required if "it appears in the record that the point urged on appeal was called to the attention of the trial court in such manner as to clearly advise it as to the question of law involved." Although the official stenographic record as above related reveals that the Court, shortly before adjournment on April 9, stated to the jury "that counsel wanted to discuss with the Court the instructions which the Court would give," there is nothing in the record to indicate that at that time, or at any other time, plaintiff's counsel called to the Court's attention the questions of law which plaintiff's counsel now urges on appeal.

The jury's verdict in favor of the defendant was returned on April 14, 1964. On Friday, April 24, plaintiff's counsel dictated a statement to Mr. Czompoly, the court stenographer, and on the same (4) day the stenographer

transcribed the statement and delivered the original of the transcription to the Court. This statement dictated by plaintiff's counsel hereinafter will be referred to as "the transcript." On Monday, April 27, 1964, the Court caused the transcript to be filed with the Clerk of the Court.

The record is silent as to how, when, and by whom the transcript was served on counsel for the defendant, but apparently it was served because on May 28, 1964, counsel for the defendant filed a motion to strike the transcript, which motion is entitled "Motion to Strike from the Files Purported Objections of Counsel for the Plaintiff to the General Charge, Filed April 27, 1964."

Counsel for plaintiff and defendant in their briefs upon the question of the admissibility of the transcript devote their entire attention to the applicability of Rule 51, F. R. C. P. Neither counsel makes any reference to Rule 75(n), which provides as follows:

> "In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal."

Nor do counsel make reference to Rule 75(h), which provides in part as follows:

> "It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule

> and in Rule 76, but if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth."

(5) By reason of the failure of counsel to strictly comply with or to make any reference to Rule 75(h) or (n), some doubt is cast upon whether the transcript was sought to be lodged in accord with Rule 75(n). The transcript is obviously an effort by plaintiff's counsel to cure his failure to timely object, so that the official record would show a compliance with Rule 51.

The fact is that counsel and the Court did meet in the Court's chambers immediately following the adjournment on the afternoon of April 9th and did there discuss the propriety of certain interrogatories which counsel requested the Court to submit to the jury, and did at considerable length discuss the law of the case as well as the instructions the Court intended to give to the jury. This discussion in chambers dealt with the Court's charges and refusals to charge, as well as the propriety of interrogatories which counsel submitted. There was no stenographer present, and the discussion was not entered on the minutes of the court or otherwise reduced to record form. Nevertheless, the discussion was a proceeding during the trial. *Middleton v. Hartford Accident & Indemnity Co.*, 119 F. 2d 721, 723:

> " 'Proceedings' include the oral motions and judgments during the trial, the rulings on evidence, the selection of the jury where there is one, the charges and refusals to charge, and the many occurrences of a trial which are not entered on the minutes of the court or otherwise reduced to record form."

In the interest of justice, and to make the record conform to the truth, I hold that the transcript is submittable

under Rule 75(h) and (n), Federal Rules of Civil Procedure.

Defendant's motion to strike from the files the so-called transcript will be treated by the Court as an objection under Rule 75(n). It is to be noted that defendant's brief in support of its motion does not object to or propose any amendments to the statements of plaintiff's counsel in the transcript, except the following sentences appearing in the first paragraph of the brief:

> (6) "Counsel met with the Court the morning of April 10 and were advised by the Court of the substance of the charge. At the conclusion both *counsel for the plaintiff and counsel for the defendant expressed their approval of the charge as outlined by the Court.*"

This proposed amendment is true and correct as far as it goes, but it does not go far enough. In fairness to plaintiff's counsel, the Court must add that while he made no objection to the specific language employed by the Court he did strenuously urge that the substance of the charge was erroneous in that it did not include a charge on the doctrine of res ipsa loquitur, to which plaintiff's counsel said he was entitled.

The Court settles and approves the following statement for the record on appeal, in accord with Rule 75(h) and (n), Federal Rules of Civil Procedure:

> On Thursday, April 9, 1964, upon request by both counsel at the conclusion of the evidence, counsel retired with the Court to discuss proposed charges prepared by both counsel, as well as interrogatories prepared by counsel for the defense; all of which had been exchanged between counsel and submitted to the Court prior to the above-stated retirement to the chambers of the Court.

The Court first considered the proposed charges of the plaintiff. With regard to Charge No. 1, the last paragraph thereof reads as follows:

> "You are further instructed that upon proof by Plaintiff of a defect in such facility under Defendant's exclusive possession, management and control, which renders such facility unreasonably hazardous to his safety as an employee, the Plaintiff, upon such proof, makes a prima facie case of negligence against the Defendant which entitles you, the jury, to infer that Defendant was negligent in failing to use reasonable care to provide a reasonably safe facility, and particularly that Defendant could and should have discovered the defective condition thereof and provided an adequate warning of its existence or corrected the defect."

(7) In discussion of this charge, the official volumes upon which it was based were handed to the Court, namely, 317 F. 2d 693, containing the case of *Miller v. Cincinnati, N. O. & T. Pacific Ry. Co.*, and 374 U. S. 1, containing the case of *Shenker v. B. & O.*

The Court stated, after having carefully considered the contents of both of the above-stated opinions, that the requested charge by plaintiff was based upon the doctrine of res ipsa loquitur; and that in the opinion of the Court the doctrine of res ipsa loquitur was not applicable to the facts as shown by the evidence in the instant case. The Court, therefore, stated that he would not give the charge proposed; and when requested to charge upon the substance thereof, stated that he would not give any charge involving the res ipsa loquitur doctrine because of his belief that the doctrine was not applicable to the facts of the case.

Upon consideration of the charges requested by the defendant, the Court agreed to give defendant's first instruction, reading as follows:

> "Negligence of the defendant shall not be inferred from the fact that Mr. McKee has been injured. The plaintiff has the burden of proving by a

preponderance of the evidence that the board which was missing at the time and place of Mr. McKee's accident was actually known to have been missing by the defendant or had been missing for a sufficient length of time to charge the defendant with constructive notice and in the exercise of ordinary care with the duty to repair the condition or effectively warn the plaintiff of its existence."

Counsel for the plaintiff advised the Court that the giving of this instruction, without giving plaintiff's requested instruction on the res ipsa loquitur doctrine, was objectionable to the plaintiff.

At the conclusion of discussion of the charges, the Court then discussed the various interrogatories propounded by the defendant.

With regard to Interrogatory No. 1, which was given, the plaintiff advised the Court that he objected to Interrogatory No. 1 as it was the belief of plaintiff that interrogatories should be directed to the ultimate issues of fact to be decided by the jury and not merely to evidentiary facts, bearing upon the ultimate issue of fact.

(8) The Court settles and approves as part of the record that, during the discussions which occurred in the Court's chambers on the afternoon of April 9 and the morning of April 10, plaintiff's counsel distinctly objected to the instructions which the Court stated would be given and, further, that he clearly advised the Court that the plaintiff was entitled to an instruction on the doctrine of res ipsa loquitur. The Court further settles and approves that at the time plaintiff's counsel objected and stated his desire for an instruction upon the doctrine of res ipsa loquitur the Court advised plaintiff's counsel he could take an exception to the charge of the Court.

The Court will not settle and approve as part of the record those portions of the transcript submitted by plaintiff's counsel not specifically included herein, for the reasons that (1) the Court does not have a

> sufficient recollection to permit approval, and (2) such other statements are not necessary to a decision upon the proposition involved.

Plaintiff's counsel put the Court in full possession of the reasons why the Court's interpretation of the applicable law was regarded to be erroneous and distinctly stated plaintiff was entitled to the benefit of an instruction upon the doctrine of res ipsa loquitur, and supporting authorities were presented. From the foregoing addition to the record on appeal it is the Court's judgment that the underlying purpose of Rule 51 was adequately met.

Upon consideration of branches 2 and 3 of the motion for a new trial, the Court at the outset of this memorandum called attention to the similarity of these branches. In essence, the plaintiff seeks a new trial based upon the claim that the Court erred in refusing to give the plaintiff the benefit of an instruction upon the doctrine of res ipsa loquitur. The Sixth Circuit, in the case of *O'Mara v. Pennsylvania R. R. Co.*, 95 F. 2d 762, has declared when the doctrine of res ipsa loquitur is applicable, as follows:

> (9) "The doctrine is one of necessity, applicable where the agency or place of the accident is accessible only to the defendant and under his control, and raises an inference of negligence requiring the defendant to explain the accident, if he may, on grounds other than his negligence, when its nature is such as to make it probable that it would ordinarily not have happened except for his negligence." (P. 763.)

In the instant case both parties have admitted that on August 15, 1961, the defendant had on its property what has variously been described as a wooden bridge, stairway, and platform south of the signal bridge shanty, and that the same constituted a railroad facility, under the exclusive possession and control of the defendant, which

on the date involved herein was being held open for the use of the defendant's employees to gain access to the signal bridge shanty. It has been further admitted that on the night of August 15, 1961, at the time the plaintiff was traversing upon said facility, a board which formed a part of the walking surface thereof was missing, and that the plaintiff stepped into the opening occasioned by the absence of the board. Under these circumstances there is no necessity to use the doctrine of res ipsa loquitur. The *Miller* and *Shenker* cases, *supra,* relied on by plaintiff's counsel in the Court's chambers, are not applicable to the facts in this case, and the additional cases offered by plaintiff in the motion for a new trial merely supplement *Miller* and *Shenker.*

The motion for a new trial will be overruled.

GIRARD E. KALBFLEISCH,
United States District Judge.

APPENDIX E.

COMPARISON OF CHARGE AND REQUESTED CHARGE.

Portions of Charge Relating to Notice as Given by the Court	Plaintiff's Requested Charge
You are further instructed that the Plaintiff must prove, by a preponderance of the evidence, that on August 15, 1961, when he claims to have been injured, that a *board was missing from the facility provided by the Railroad which rendered such facility unsafe.*	You are further instructed that upon proof by Plaintiff of a defect in such facility under Defendant's exclusive possession, management and control, which renders such facility unreasonably hazardous to his safety as an employee, the Plaintiff upon such proof, makes a prima facie case of negligence against the Defendant which entitles you, the jury, to infer that Defendant was negligent in failing to use reasonable care to provide a reasonably safe facility, and particularly that Defendant could and should have discovered the defective condition thereof and provided an adequate warning of its existence or corrected the defect.
You are instructed, as a matter of law, that under the undisputed evidence in this case, the wooden bridge, stairway and platform south of the signal bridge shanty constituted a railroad facility on railroad property under the *exclusive possession and control of the Railroad and held open for the use of employees* to gain access to the signal bridge shanty on the night of August 15, 1961, and for a long time prior thereto.	
(354) With regard to such a facility, the law imposes upon the *Defendant, as a railroad employer, a continuing nondelegable duty to exercise reasonable care to maintain such facility in a reasonably safe condition for use by its employees, which includes a duty to exercise ordinary care to inspect and to discover and correct any defect which would render such facility unreasonably hazardous, if such defect was known, or in the exercise of ordinary care could and should have been known, by the Defendant, with reasonable opportunity to correct the defect.*	

Portions of Charge Relating to Notice as Given by the Court

You are further instructed that such duty continues and is in full force and effect, regardless of how fleetingly or infrequently the employees of Defendant may have occasion to use such facility.

Plaintiff is entitled to recover damages if negligence of the Defendant proximately caused, in whole or in part, his injuries. This means that Plaintiff, to be entitled to a verdict in his favor, must prove that the defect complained of was caused by Defendant's negligence, and that such negligence **(355)** in some degree, no matter how slight, was a producing cause of Plaintiff's injuries and disabilities.

The fact that other accidents, or other causes, including Plaintiff's own negligence, if any, was also a producing cause of Plaintiff's injuries and disabilities, if you should so find, does not bar Plaintiff from recovering a verdict.

The test of Defendant's liability is whether it was in some degree negligent so as to proximately cause, in whole or in part, the injuries and damages of Plaintiff.

Negligence of the Defendant shall not be inferred from the fact that Mr. McKee has been injured. The Plaintiff has the burden of proving, by a preponderance of the evidence, that the board, which was missing at the time and place of Mr. McKee's accident, was actually known to have been missing by the Defendant, or had been missing for a sufficient length of time which, in

Portions of Charge Relating to Notice as Given by the Court

the exercise of ordinary care, would charge the Defendant with constructive notice and, in the exercise of ordinary care, with the duty to repair the condition or effectively (356) warn the Plaintiff of its existence.

Throughout this case, counsel have used the term "actual or constructive notice." This term, as used, will also appear in an interrogatory which will be submitted to the jury for its answer. For the purposes of that interrogatory and for the purposes of these instructions, this term, "actual or constructive notice," is defined as follows:

"Actual notice is such notice as is proved to have been given to a party directly and personally, or such as he is presumed to have received personally because the evidence within his knowledge was sufficient to put him upon inquiry. While constructive notice is information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it."

If you find that the Plaintiff has proved, by a preponderance of the evidence, that the Defendant received actual notice of the missing board and had a reasonable time after such (357) notice to repair it before the Plaintiff was injured, you should return a verdict in favor of Plaintiff.

If you find that the Plaintiff

Portions of Charge Relating to Notice as Given by the Court

failed to prove, by a preponderance of the evidence, that the Defendant received actual notice; *but further find that the Plaintiff has proved, by a preponderance of the evidence, that the Defendant had constructive notice of the missing board and had reasonable time to repair the defect before the Plaintiff was injured, you should also return a verdict for the Plaintiff.*

If the Plaintiff has failed to prove, by a preponderance of the evidence, that the Defendant had either actual or constructive notice of the missing board, so as to have had a reasonable opportunity to repair it or to warn the Plaintiff of the defect, then your verdict should be for the Defendant.

An injury is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the injury. So if you find from the evidence (358) that any negligence on the part of the Defendant contributed, in any way or manner, toward an injury suffered by Plaintiff, you may find that injury was proximately caused by Defendant's act or omission.

Now, this does not mean that the law recognizes only one proximate cause of an injury, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independ-

Portions of Charge Relating to Notice as Given by the Court

ently or together, to cause an injury; and in such a case, each may be a proximate cause.

Since a corporation can act only through its officers, or employees, or other agents, the burden is upon the Plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of the corporation, of one or more officers, or employees, or other agents of the Defendant, other than the Plaintiff himself, in whole or in part, proximately caused the injury and consequent damages sustained by the Plaintiff. *Any negligent act or omission of an officer, or employee, or other agent, of* **(359)** *a corporation in the performance of his duties is held, in law, to be the negligence of the corporation.*

In determining whether ordinary care was used by the railroad, you will consider whether the railroad ought to have inspected and discovered the missing plank under the attending circumstances with reasonable opportunity to repair it. If an ordinary person under similar circumstances, or by the use of ordinary care, would have foreseen the result, and would have taken precautions to avoid the result, then the performance of the act or the failure to take such precaution constitutes negligence. (Emphasis added.)